BORA LASKIN LAW LIBRARY
3 1761 04863 2640

UNIVERSITY OF TORONTO

FACULTY OF LAW

TRIAL ADVOCACY COURSE

[2002 - 2003]

MATERIALS FOR TRIAL ADVOCACY

PROBLEMS AND CASE FILES

LAW SCHOOL EDITION

BORA LASKIN LAW LIBRARY
SEP - 4 2002
FACULTY OF LAW
UNIVERSITY OF TORONTO

UNIVERSITY OF TORONTO

FACULTY OF LAW

TRIAL ADVOCACY COURSE

MATERIALS FOR TRIAL ADVOCACY

PROBLEMS AND CASE FILES

LAW SCHOOL EDITION

Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/materialsfortria00hann_0

TRIAL ADVOCACY
CASEBOOK
UNIVERSITY OF TORONTO
FACULTY OF LAW

INDEX TO MATERIALS

Course Description ..... Tab 1

READINGS

Introductory Note: Examination in Chief, Cross-Examination and Re-Examination ..... Tab 2

Refreshing Memory ..... Tab 3

Introducing Exhibits Into Evidence ..... Tab 4

Demonstrative Evidence (Introductory Note) ..... Tab 5

Impeachment by Prior Inconsistent Statement ..... Tab 6

Using Examination for Discovery for Impeachment Purposes ..... Tab 7

Checklist for a Cross-Examination on a Transcript ..... Tab 8

Impeachment and Rehabilitation ..... Tab 9

Principles of Civility (Advocate's Society) ..... Tab 10

CASE FILES

Manning v Carleton ..... Tab 11

NLC v. CRL Ltd. ..... Tab 12

R. v. Screech(possession of narcotics short trial) ..... Tab 13

Gentry v. Smith(impeachment) ..... Tab 14

R. v. Fletcher(impeachment) ..... Tab 15

R. v. O'Reilly(expert examination - psychiatrist) ..... Tab 16

Newman v. Kramer(expert examination - accountant) ..... Tab 17

UNIVERSITY OF TORONTO
Faculty of Law
TRIAL ADVOCACY COURSE

COURSE DESCRIPTION

1. Materials

Required Readings (Available from Law Book Store)

(a) Casebook: Materials for Trial Advocacy: Problems and Case Files, Broun and Seckinger, adapted for Canadian usage by Prof. Garry D. Watson

(b) Text: S. Lubet Modern Trial Advocacy, Canadian Edition adapted for Canada by Sheila Block and Cynthia Tate. (National Institute for Trial Advocacy, 1995).

(c) Course Description

Optional Readings (On reserve).

There is a book of readings on reserve in the library entitled Pilkington and Watson, ed, Selected Readings in Trial Advocacy (1981, revised 1988). A separate bibliography is included with these materials, which you may find useful during the course.

You will frequently make reference to the law of evidence and procedure and will want to have access to:

i) A text on evidence – recommended: Sopinka Lederman and Bryant, The Law of Evidence in Canada (Toronto, Butterworths, 1992).

ii) Evidence Act, R.S.O. 1990, c.E.23.

iii) Canada Evidence Act, R.S.C. 1985, c. C-5.

iv) The Ontario Rules of Civil Procedure.

v) Criminal Code, R.S.C. 1985, c. C-46.

Ethical Questions frequently arise in the trial advocacy course. Please read carefully Rule 10, "The Lawyer as Advocate", from the Professional Conduct Handbook, The Law Society of Upper Canada, reproduced in Pilkington and Watson, Selected Readings in Trial Advocacy.

2. Use of Casebook and Sequence of Study

The Casebook contains Readings and Casefiles. Some of the Casefiles contain instructions for use in a Trial Advocacy programme format. Others do not. The Sequence of Study, which will be distributed separately, will contain directions as to the readings to be done, the case file to be worked on, and the assignment or specific task for the evening in question.

3. Learning Method

The purpose of the course is to assist you in developing the basic skills of trial advocacy so that you can conduct a trial from beginning to end with reasonable competence.

The method and materials are based on a program developed in the United States by the National Institute for Trial Advocacy (NITA) and adapted for Canadian use by Prof. Garry D. Watson. The method is explained in the Introduction to the Casebook. Basically, the techniques employed are (a) demonstration by experienced counsel, (b) student performance, and (c) critique.

How, within this framework, do you develop the requisite skills to a reasonable level? Obviously the major key is careful preparation for each assignment. But how do you prepare? The assigned readings will assist you-- and you should read them. After you have done that, and carefully read and analysed the assigned problem, what should you be considering in preparing for your performance?

There are several aspects of the teaching methodology to be used in this course which call for particular explanation.

Although you are expected to prepare the whole of the problem(s) that you are assigned each evening, when it comes to in-class performance, you will only be called upon to perform a segment - typically 5 minutes. Your instructor will direct you to the segment you are to perform. There is a specific rationale for this "5 minute format". Experience indicates that trial skills are developed best by students frequently performing short segments, rather than a single long performance. Obviously if each student was given the opportunity to do the complete assignment each evening, not every student could perform even one assignment on a given evening. Experience also indicates that 5 minutes gives you an opportunity to adequately demonstrate your present level of performance so that suggestions as to how to improve your performance can be offered. The reality is that if you perform for 10 minutes rather than for 5 minutes, you would essentially repeat the standard of performance that was demonstrated in the first 5 minutes.

In class, you will normally be called upon in pairs. When you have been called up, but are not examining, you will be expected to play the role of opposing counsel and to make any proper objections. Initially, you may be asked to make all possible objections, and later, only the objections you would choose to make to serve your strategy at trial. In addition, the non-performing students will be responsible for making any objections overlooked by the opposing counsel. In preparation for making and responding to

objections, we recommend that you review the applicable evidence law. However, this is not a course in evidence and the focus of your preparation and performance should be the assigned problems. Most instructors will not permit performance time to be taken up debating the evidentiary points.

Unless directed otherwise by your instructor, you are to assume that all problems arise in a trial that is being conducted before a judge and jury. Given that civil jury trials are now quite rare in Canada, questions are often raised as to why we use this assumption. The reason is that law students, for some strange reason, have it firmly fixed in their minds that judges like to have the facts presented in a complicated manner and they also like to be bored. Obviously this is untrue. On the other hand, students recognize the need to simplify the facts for a jury and to make the story-telling interesting. By assuming that all the assigned performances arise in the context of a jury trial, it is hoped that you will indeed strive to make your factual presentations simple, comprehensible and interesting.

4. Class Organization and Format

The class is divided into 6 *Small Groups*. Each student has an "X" or "Y" designation. The "X" and "Y" designations are used on the *Sequence of Study* to indicate performance assignments. "X" or "Y" assignments are indicated separately in these materials.

The instructors in each section will rotate through the small groups although an attempt will be made to keep the same group of three instructors to the same two groups.. This format affords students the opportunity to be evaluated and receive comments and suggestions from different members of the teaching team while preserving some continuity of observation by instructors and therefore some enhanced assessment of improvement.

The format of the classes will vary from evening to evening and is indicated on the Sequence of Study.

- Each Tuesday evening (from 5:10 pm to 6:00 pm), all students will meet together in the Large Group for a demonstration or plenary session, to be held in a classroom to be announced (this arises from the ongoing renovation of the law school, over which we have no control). The purpose of this session is to provide a demonstration and explanation of the skills necessary to perform the tasks assigned for the workshops on the Thursday evening that follows.

- Every Thursday evening each section will divide up into small groups and go to assigned rooms (again, to be announced). During these sessions you will perform the assigned problems and your performances will be critiqued.

- On some Thursday evenings, you will meet as a section of two groups and at the end of the course, you will meet in differently configured groups, based on your final trial assignment.

(a) Trial teams and cases:

The culmination of the course will be all-day trials which will be conducted on **Saturday, November 24th and Sunday, November 25th, 2001**. These final trials will be held at the Courthouse, 361 University Avenue, in conjunction with York University Osgoode Hall Law School students taking a similar course. Instructors or experienced trial counsel will serve as judges. Pairs of Osgoode students will try a case against pairs from the University of Toronto. The cases to be tried will be a civil case and a criminal case (to be distributed separately). Four student counsel will act in each trial, with two person teams on each side. Each team will participate for only one day, either Saturday or Sunday depending on scheduling.

You may choose a trial partner from the students in the class. Otherwise, you will be assigned a partner. You will also be asked to indicate a preference to try the civil or the criminal case and to act for the plaintiff/prosecutor or the defendant/accused. As far as possible, preferences will be accomodated. Traditionally, Osgoode has taken on the task of scheduling the trials and the trial teams. This is a difficult task, and one which has usually made most people happy. However, it is possible that it will be simply impossible to accomodate your trial preference. We would ask for your understanding if this occurs. You should complete the Case Preference Form found at the back of the Course Outline and submit it to Merrill Randall on or before September 15, 2001. If you do not submit the form by that date you will be assigned to a final trial. No changes are permitted. The form will be provided in the Sequence of Study.. You will be informed in late October or early November of your actual trial date and assignment.

(b) Witnesses:

It will be the responsibility of each trial team to arrange for and prepare the witnesses they plan to call.

(c) Jurors:

You should prepare to invite friends, family, or others to attend at your final trial and play the role of a juror.

(d) Trial Book:

You are encouraged to prepare a trial book for use at the trial. A trial book normally contains the following:

(i) a tactical analysis of the case, setting forth your theory of the case, the problems you anticipate and how you expect to handle them;

(ii) a proof check list, setting forth (a) every fact you must prove as part of your case, indicating the source or sources, i.e. witnesses, exhibits, judicial notice, admission, etc.; (b) every fact the other side must prove;

(iii) outlines of your Opening Statement and Closing Argument;

(iv) a list of witnesses you expect to call, in the order you expect to call them;

(v) a complete outline of your preparation for the direct and cross-examination of all witnesses, each outline starting on a separate page, and your notes of items to cover in re-examination;

(vi) copies of all exhibits you plan to introduce;

(vii) copies of any previous statements made by witnesses, with key passages indexed and a note as to the manner in which the statements are used, if at all;

(viii) legal memoranda on the substantive issues;

(ix) legal memoranda on any anticipated evidence issues;

(x) written outline of proposed jury instructions.

For further direction, see articles in Selected Readings and those referred to on the reading list.

The preparation of your trial book is not a "make-work" project. Although you are not required to submit the trial book to be graded, you cannot conduct a trial properly without it.

9. Evaluation

Your final grade will be based upon your class participation (including being adequately prepared for witness assignments), any written submissions required during the course, and satisfactory completion of the final trial. The final trial will be graded based on the trial judge's assessment of your performance. The trial must be satisfactorily completed in order to obtain credit in the course. The course is graded Honours/Pass/Fail.

Weekly performances are scored out of 10 and based on preparation, theory and presentation. At the conclusion of the course, the performance grades are aggregated and divided by the total number of assignments performed for a final grade out of 10. The grade of each student in a group is then reviewed by the relevant Small Group instructor and Section Leader to ensure that it fairly represents the student's performance throughout the course. All grades are reviewed by the Course Chair to ensure consistency among sections. Spotty attendance or non-performance in the final trials without adequate explanation will affect your grade.

Student evaluation of the course is taken seriously and past evaluations have resulted in changes (hopefully improvements) to the course. However, the course cannot be adequately evaluated until you have conducted your trial. The class will meet for a de-

briefing and post-trial analysis on either the Tuesday or Thursday evening after the trials. Evaluations will be distributed and you will be handing them in during that class. Consistent with Faculty policy, no evaluations are read by instructors until grades have been submitted to the Records Office.

10. Reading about Trial Advocacy

A major focus of this course is learning by doing coupled with critique of your performance. This involves thorough preparation and the ability to listen to the comments made on your performance and that of other students in your class. The emphasis on performance in class leaves little or no time for lecturing. **However, this gap can and must be overcome by out of class reading.**

The writing on trial advocacy is voluminous, increasing, varied in quality and utility (i.e. some people find author A very useful, while others may not). To get the most out of the course you should do the reading. Each week there will be specific suggested reading assignments, however, these do not represent all the reading you should do in this course. The following represent the overall reading goals for the course.

Lubet should be read in its entirety by the end of the term.

At the outset of the course you may find it helpful to read Hegland, Trial and Practice Skills (on Reserve) Chapters 1, 2, & 4. The book is short, merely introductory but excellent when you are a beginner.

At the outset, or by the end of the course, you should read all of one (or both) of the following books: Sopinka, The Trial of an Action; Williston & Rolls, The Conduct of an Action. While not exclusively concerned with trial advocacy in the narrowest sense, they both deal with preparing for and conducting a civil trial. You may wish to purchase your own copies. Both are published by Butterworths.

You should read "Some Points on Trial Advocacy", found in the Casebook, which is not meant to be a substitute for more substantive readings, but which outlines some basic points with regard to trial advocacy.

In addition to the assigned text, there are five recently published Canadian texts on Trial Advocacy which are well worth your attention. They are on reserve in the library.

Earl Levy, Examination of Witnesses in Criminal Cases (Carswell, 1991).

F. Moskoff (Editor), Advocacy in Court - A Tribute to Arthur Maloney (Canada Law Book, 1986).

R. Salhany, Cross Examination: The Art of the Advocate (Butterworths, 1988).

J. Olah, The Art and Science of Advocacy, (Carswell, 1990).

G. Adair, On Trial, Advocacy Skills Law & Practice (Butterworths, 1992)

11. Arnup Cup Trial Advocacy Competition

This is an annual competition among Ontario law schools which is normally held at the University of Windsor Law School in February or March following the course conclusion.The University of Toronto sends a team of two students selected by the instructors from the students in the Trial Advocacy Course. The selection of the team will be made following the final trials,and this selection is made following consultation with all faculty. The University of Toronto has been the recipient of the Arnup Cup in 2000, 1999, 1997, and 1996 and a runner up in 2001.

12. The Sopinka Cup Competition

In 1999, the first annual national trial advocacy competition was held in Ottawa, with teams from each of the provinces competing. This competition is sponsored in part by the American College of Trial Lawyers, and by firms across Canada. As the winner of the Arnup Cup in 1999, the University of Toronto team formed part of the Ontario contingent at the Sopinka Cup competition. The University of Toronto team (Kate Hilton and David Armstrong) was the recipient of the first award of the Sopinka Cup for overall best case presentaion, and Kate Hilton was awarded the prize for best cross examination in the trial competition. In the year 2000, Jenny Friedland and Noel Peacock won the Arnup Cup and as a result represented the University of Toronto at the Sopinka Cup competitions, where the prize for best examination in chief was awarded to the University of Toronto. In 2001, the University of Toronto again placed in the Sopinka Cup, winning the prize for best cross examination. The team in this year was Eileen Costello and Nick Adamson, both of whom will be working in the faculty team in 2001.

Over the past ten years of the Trial Advocacy course at the University of Toronto, we have been informed that the course has been a very positive experience for those who have taken it. We, the faculty, are proud to be part of a course that we hope will prove helpful in whatever area of law is pursued by those taking the course. We hope that you will enjoy the course as much as we enjoy teaching it.

::ODMA\PCDOCS\LITIGATE\289304\1